

Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 5/20/2003)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company (U 39 M), a California Corporation, and the California Waterfowl Association, A California Public Benefit Corporation, for an Order Market Valuing and Authorizing the Former to Transfer to the Latter Certain Land in Shasta County (McArthur Swamp) and Related Property Pursuant to Public Utilities Code Sections 367(b) and 851.

Application 00-05-029
(Filed May 15, 2000)

Application of Pacific Gas and Electric Company (U 39 M), a California corporation, the State of California, acting by and through its Department of Parks and Recreation, with the approval of its Department of General Services (DPR), and the California Waterfowl Association, A California Public Benefit Corporation (CWA), for Orders Pursuant to Public Utilities Code Sections 367(b) and 851 (1) Establishing the Market Value of and Authorizing Pacific Gas and Electric Company to Transfer to DPR Certain Pieces of Land in Shasta County (Burney Falls) in Exchange for Land Currently Owned by DPR (Ahjumawi), and (2) Authorizing Pacific Gas and Electric Company to donate Ahjumawi to CWA.

Application 00-05-030
(Filed May 15, 2000)

**OPINION ADOPTING
FINAL MITIGATED NEGATIVE DECLARATION
AND DISMISSING APPLICATIONS WITHOUT PREJUDICE**

1. Summary

As Pacific Gas and Electric Company (PG&E) acknowledges, the recent Federal Energy Regulatory Commission (FERC) order renewing PG&E's Pit 1 hydroelectric plant license bars the transfer of land and other property at issue in these consolidated applications, since some of the land is within the license boundary. Though PG&E had asked FERC to remove certain lands from the license, FERC has declined to do so. Accordingly, we dismiss these applications without prejudice; if PG&E is able to restructure the transactions, it may refile. To ensure that the environmental review performed to date is not lost, we discuss and adopt the Final Mitigated Negative Declaration (Final MND) prepared in conjunction with these applications.

2. Factual Background

PG&E and the other named applicants to these consolidated applications propose two separate but partially related transfers of land and other property located in Shasta County. The proposals all include provisions by which PG&E explicitly retains all water rights in the transferred land, as well as rights to enter the land for maintenance and operation of existing transmission and distribution facilities. A summary of the proposed transactions follows.

Application (A.) 00-05-029 concerns the proposed transfer to the California Waterfowl Association (CWA), under a conservation easement, of approximately 7,400 acres of land commonly known as McArthur Swamp, as well as 5½-acre strip of land about one mile west referred to as the Glenburn Dredge Site and the dredge used for maintenance of nearby levees. About 2000 acres in the

McArthur Swamp parcel fall within the boundaries of License No. 2687, the Federal Energy Regulatory Commission (FERC) license PG&E holds to operate Pit 1, one of several hydroelectric generation facilities on the Pit River. At the time PG&E filed A.00-05-029, its Pit 1 license renewal application was pending before FERC and sought removal of these 2,000 acres from the Pit 1 license.

A.00-05-030 concerns a two-part land transaction. First, PG&E proposes to exchange lands known as Bowman Ditch (four acres) and Burney Falls (182 acres) with the California Department of Parks and Recreation (DPR) in return for two things: (1) 544 acres of state-owned, flooded property in Shasta County that is part of the area commonly known as Ahjumawi Lava Springs State Park and (2) a release of any potential claims against PG&E for failure to maintain certain failed levees. Second, PG&E then proposes to transfer the Ahjumawi property to CWA subject to a conservation easement, deed restrictions that limit use of the property, and a document entitled the McArthur Swamp Management Plan; thereafter, CWA would enter into a Grazing Lease Agreement with the McArthur Resource Management Association, a consortium of ranchers who currently have grazing rights on portions of McArthur Swamp.

PG&E describes the exchange of Burney Falls and Bowman Ditch for the Ahjumawi property as an “in-kind” transfer that results in a non-taxable event. At the present time, approximately 112 acres of Burney Falls are located within FERC License No. 233, which authorizes PG&E to operate the hydroelectric project known as Pit 3, 4 and 5. FERC has already approved transfer of Burney Falls to DPR in fee subject to the license and PG&E has asked FERC to remove it from the project boundaries.

Notably, while the first part of the proposed A.00-05-030 transaction (the DPR exchange) is independent of approval of A.00-05-029, the second part

(transfer of the Ahjumawi land to CWA) is contingent upon approval of A.00-05-029, since CWA will not accept the Ahjumawi land unless it also receives Burney Falls and the Glenburn Dredge Site.

The applications propose similar ratemaking proposals. Key aspects include: deducting the book value of the transferred properties, together with associated transaction costs, from the market value of Pit 1 before this value is entered into the Transition Cost Balancing Account (TCBA),¹ removing the costs associated with the transferred properties from the PG&E revenue requirement; and adjusting the rate base for Pit 1 to reflect retirement of assets associated with the transferred properties.

After a draft decision disposing of this proceeding was mailed for comment on February 28, 2003, FERC issued a draft and then a final license in PG&E's Pit 1 license renewal application. FERC's order denies PG&E's request that the specified lands be deleted from the Pit 1 project boundary. The order states, in relevant part, "In summary, because the lands and facilities ... are either part of the unit of hydroelectric development or serve licensed project purposes, they must remain under license." (FERC Order Issuing New License in Project No. 2687-014, March 19, 2003, mimeo at pp. 7-8, ¶ 22.)

We note that no party opposes the land transfers. The Commission's Office of Ratepayer Advocates (ORA) has expressed enthusiasm for the environmental ramifications of the exchanges and urges that the Commission find that the transfer is in the public interest. ORA also urges that the Commission find that the transfers will benefit PG&E's ratepayers because they

¹ Market valuation of Pit 1 is at issue in PG&E's hydroelectric proceeding, A.99-09-053.

will “lower maintenance costs of PG&E’s generating system on the Pit River.” (Opening Brief on AB 6X Issues, p. 7.) However, ORA also states that “[i]n light of the regulatory changes that have occurred since these applications were filed, it is not clear to ORA whether PG&E’s proposed ratemaking still is feasible.” (*Id.* at p. 3.) ORA states that it has had discussions with PG&E about revising the ratemaking proposals and accordingly “ORA takes no position at this time on the ratemaking aspects of these applications.” (*Id.* at p. 4.) As we relate in the procedural discussion below, PG&E ultimately determined not to revise its ratemaking proposal. ORA has not commented on PG&E’s determination nor clarified it’s own position on the ratemaking proposal.

3. Procedural History

PG&E filed these applications on May 15, 2000. Following the first prehearing conference (PHC) on June 22, Administrative Law Judge (ALJ) Hale issued rulings on June 30, August 7, and October 2, 2000, that directed PG&E to amend both applications to address identified deficiencies in them. The August 7 ruling also consolidated the proceedings for hearing, but stated a separate decision would issue on each application. PG&E filed amended applications on October 23, and the Commission held a second PHC on October 25.

Subsequently, the Legislature passed and the Governor signed Assembly Bill 6 (Stats. 2001, 1st Ex. Sess., c.2), often referred to as AB 6X, which amended Pub. Util. Code § 377², effective January 18, 2001, to require the retention of

² Unless otherwise indicated, all subsequent references to sections refer to the Public Utilities Code.

public utility generation assets until January 1, 2006. On February 28, 2001, these proceedings were reassigned to ALJ Vieth. Several months later, on April 6, 2001, PG&E filed for relief under Chapter 11 of the Bankruptcy Code. PG&E did not withdraw these applications, however, and since review in accordance with the California Environmental Quality Act (CEQA) had already commenced, that review continued. On October 30, 2001, the Environmental Branch of the Commission's Energy Division, together with its consultant, issued a Draft Mitigated Negative Declaration (MND) for public review and comment. A Final MND issued on January 24, 2002. Pursuant to the ALJ's ruling, the MND has been identified as Reference Exhibit A and placed in the formal files of this proceeding.

On May 13, 2002, ALJ Vieth issued a ruling requesting briefs on the application of AB 6X to these proposed land transfers. PG&E and ORA filed briefs and PG&E filed a reply brief. The reply brief stated PG&E's intent to amend both applications again to revise the ratemaking treatment proposed but in a subsequent letter, PG&E advised the ALJ that, upon reconsideration, it saw no need for a different ratemaking proposal and would not file amendments.

On February 28, 2002, a draft decision issued for comment and thereafter was placed on the Commission's April 3, 2002 agenda as consent agenda item # 7 (CA-7). However, following FERC's March issuance of the new Pit 1 license, the ALJ Division subsequently withdrew the draft from the Commission agenda.

PG&E and the Commission's Office of Ratepayer Advocates (ORA) filed comments on the draft decision. PG&E also filed reply comments. In addition, both the Southern California Edison Company (Edison) and Pacific Terminals LLC (Pacific Terminals) filed requests to intervene for the purposes of filing comments on the draft decision's interpretation of § 377. These entities express

concern that the statutory interpretation, if adopted by the Commission, would have implications for the outcome of other proceedings in which these entities have a direct interest. Good cause appearing, pursuant to Rules 45 and 53 of the Commission's Rules of Practice and Procedure, we grant the interventions and accept for filing the comments tendered by Edison and by Pacific Terminals.

4. Discussion

The land transfers proposed in these consolidated applications are predicated upon the assumption that FERC would agree to remove certain lands and related property from PG&E's Pit 1 license. Since FERC has declined to do so, the transfers cannot proceed as proposed, even in the absence of a statutory bar. Thus, while the February 28 draft decision determined that Pub. Util. Code § 377 bars the transfer of land and other property at issue in these consolidated applications—and while the comments all reject that statutory interpretation—the legal issue is no longer ripe for determination and we decline to address it here.³

PG&E asks that we hold these consolidated applications “in abeyance” while it determines whether, and if so, how, these transactions may be restructured in light of FERC's order. We decline to do so, as these applications are already three years old. In keeping with legislative urgings that we actively monitor case management, we conclude that these applications should be dismissed without prejudice. If PG&E is able to restructure the transactions in the future, it may file a new application or applications.

³ Interpretation of § 377 is at issue in several other proceedings, including two first noticed for decision on the Commission's April 3, 2003 agenda.

In its comments on the draft decision, PG&E states that it has filed a rehearing request at FERC concerning the continued inclusion of McArthur Swamp in the new Pit 1 license, but concedes the timing and outcome of any rehearing is uncertain. PG&E then suggests that we dismiss only A.00-05-029, which concerns the McArthur Swamp transfer, and hold A.00-05-030 in abeyance while PG&E and the parties attempt to renegotiate their agreement regarding the Burney Falls, Bowman Ditch and Ahjumawi transfers. As we have already explained, holding a proceeding in abeyance is inconsistent with efficient case management. Neither does it provide the parties with significant administrative advantage. If they revise their agreement and sever the substantive linkage the current agreement imposes on the two applications, they will need to amend A.00-05-030. That amendment, just like a new application, will be subject to 30-days public review and comment. We will ensure that a new application, once complete, receives timely administrative review.

Several comments argue that the draft decision erred in failing to review the merits of the Final MND. These comments point out that, at a minimum, a Commission-adopted MND can be used by other agencies. It can also be used as a starting place for future environmental review at the Commission. We agree and below, we address the Final MND.

ORA's comments suggest that we should make findings on the merits of the application beyond the findings on the environmental impacts contained in the discussion below. We do not have the record to do so at this time, since the ratemaking proposals in the applications have not been developed sufficiently for us to assess, for example, whether the ORA and PG&E positions are aligned or not. Since the applications cannot proceed as currently structured, there is no need for further record development at this time.

5. Environmental Review

The California Environmental Quality Act (CEQA), Pub. Resources Code §§ 21000-21176, requires the Commission, as the designated lead agency, to assess the potential environmental impact of a project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced to the fullest extent possible. The Commission uses the Proponent's Environmental Assessment, required by Rule 17.1 of the Commission's Rules of Practice and Procedure, to focus on environmental impacts and to prepare an initial study to determine whether the project will need a Negative Declaration or an Environmental Impact Report.

Staff of the Environmental Projects Unit of the Commission's Energy Division (staff), with the assistance of an environmental consultant under contract to the Commission, Environmental Science Associates (ESA), conducted three agency meetings and one field visit prior to commencing the initial study. Thereafter, staff oversaw the preparation by ESA of a Mitigated Negative Declaration and Initial Study (draft MND) which describes the project and its potential environmental effects.

5.1 MND

The draft environmental document is considered to be a *mitigated* negative declaration because, although the initial study identified potentially significant impacts, staff determined that the implementation of specific mitigation measures will reduce any impacts to a less than significant level. Since PG&E agreed to the specific mitigation measures, a draft MND could be prepared instead of an EIR. Therefore, staff prepared it and published it for public review. (Pub. Resources Code § 21080(c)(2).)

In compliance with CEQA, staff prepared a Notice of Publication of Mitigated Negative Declaration and distributed it to various city and county planning agencies and to public libraries throughout the state; the notice ran in newspapers throughout California, as well. Staff also submitted copies of the Draft MND to the Governor's Office of Planning and Research for circulation to affected state agencies for review and comment. The public review process was extended from October 30, 2001 to December 10, 2001.

Staff received 10 written comments and one verbal response from the following agencies and organizations: Department of Fish and Game; State Water Resources Control Board; Department of Transportation; Department of Parks and Recreation; PG&E; CWA; McArthur Resource Management Association; Fall River Big Valley Cattleman Association; California Indian Legal Services (Pit River Tribe); Fall River Chamber of Commerce.

All comments are addressed in the Final MND. Because of its volume, the Final MND is not appended to this decision. As noted above, the document has been identified as Reference Exhibit A in the formal file for each application.

5.2 Mitigation Measures

Mitigation measures generally are designed to protect resource categories such as biology, hydrology and water quality, geology, cultural, air quality, visual aspects, noise and traffic impacts. The Draft MND indicates that PG&E's proposed divestiture would have potentially significant impacts in the areas of air quality and cultural resources but that each identified impact can be mitigated to avoid the impact or reduce it to a less than significant. The Final MND contains the final statement of all mitigations.

In summary, the mitigation measures listed in the Draft MND and Final MND include a number of use conditions and best practices aimed at controlling

dust and particulate emissions from the properties and seven specific requirements to ensure the protection of cultural resources at McArthur Swamp and the Glenburn Dredge Site.

The Final MND also provides for a Mitigation Monitoring and Reporting Program (MMRP). Of course, because we dismiss these consolidated applications, the MMRP will not be implemented. However, its requirements may provide a useful threshold in any subsequent environmental review.

Based upon their independent environmental review, staff have concluded that PG&E's proposed project would have no have significant effects on the environment, provided PG&E were to comply with all mitigation measures outlined in the Final MND.

6. Comments on Draft Decision

The revised draft decision of the ALJ in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. ORA filed comments on June 3, 2003 and PG&E filed comments on June 9. Neither party has established legal or factual error in the draft decision and we have made no substantive changes. However, in response to matter raised in the comments, we have modified the draft decision to better explain our rationale.

7. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. Since FERC has declined to remove certain lands and related property from PG&E's Pit 1 license, the transfers described in these applications cannot proceed as proposed, even in the absence of a statutory bar.

2. Since we dismiss these applications on the same basis without reaching the merits, there is no need to issue separate decisions.

3. The Commission's staff conducted a review of PG&E's proposed project and issued a Draft MND for public review and comment.

4. Following receipt of comments, the Commission's staff prepared a Final MND.

5. With the incorporation of the mitigation measures in the Final MND, PG&E's proposed project would have no potentially significant adverse environmental impacts, were it able to proceed as proposed.

Conclusions of Law

1. The petitions to intervene filed by Edison and Pacific Terminals should be granted.

2. The Draft MND and Final MND were prepared in compliance with and pursuant to CEQA.

3. The Final MND should be adopted so that it may be used in future, consistent with CEQA.

4. The consolidated applications should be dismissed without prejudice to a subsequent filing.

5. In order to eliminate uncertainty in the parties' business dealings, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Application (A.) 00-05-029 and A.00-05-030 are dismissed without prejudice.

2. The petitions to intervene filed by the Southern California Edison Company and by Pacific Terminals LLC are granted and their comments on the draft decision are accepted for filing.

3. The Final Mitigated Negative Declaration and Initial Study (MND) is adopted for future use consistent with the California Environmental Quality Act.

4. These proceedings are closed.

This order is effective today.

Dated _____, at San Francisco, California.